IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

EMMANUEL GASTELUM MENDIVIL,
Appellant.

No. 2 CA-CR 2017-0409
Filed October 24, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20153430001
The Honorable Kenneth Lee, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Jennifer Holder, Assistant Attorney General, Phoenix
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Sarah L. Mayhew, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Espinosa and Judge Eppich concurred.

V Á S Q U E Z, Presiding Judge:

¶1 In this appeal following resentencing on three forgery convictions, Emmanuel Mendivil challenges the trial court's decision to sentence him as a repetitive offender under A.R.S. § 13-703 when the jury neither found, nor was it inherent in the verdicts, that the offenses were not committed on the same occasion. Because we find the issue waived, we affirm.

Factual and Procedural Background

¶2 After a jury trial, Mendivil was convicted of fraudulent scheme and artifice, theft, and four counts of forgery of a credit card. The trial court sentenced him as a repetitive offender for three of the forgery counts—five, six, and seven—and imposed concurrent prison terms, the longest of which was 4.5 years.[1] For the remaining counts, the court suspended the imposition of sentence and ordered concurrent terms of probation, the longest of which was seven years, to commence upon Mendivil's release from prison.

¶3 In Mendivil's first direct appeal, counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), stating she had reviewed the record but found no meritorious issue to raise. *State v. Mendivil*, No. 2 CA-CR 2016-0273, ¶ 1 (Ariz. App. Feb. 3, 2017) (mem. decision). Pursuant to our obligation under *Anders*, this court searched the record for fundamental, reversible error. *Id.* ¶¶ 2-4. We concluded the evidence was sufficient to support the jury's findings of guilt. *Id.* ¶ 2. However, we found inconsistencies in the trial court's sentencing minute entry. *Id.* ¶ 3. Specifically, the court described counts five, six, and seven

[1] Before trial, on the state's motion, the court dismissed with prejudice an additional count of theft and eight counts of forgery. The court renumbered the remaining counts for purposes of trial. Throughout this decision, we refer to the counts as listed in the indictment and sentencing minute entry.

as class-four, category-one repetitive offenses and indicated it was imposing the "presumptive term." *Id.* But, for count five, the court imposed a 2.5-year prison term—the presumptive term for a category-one repetitive offense—and, for counts six and seven, it imposed 4.5-year terms—the presumptive term for a category-two repetitive offense. *Id.*; *see also* § 13-703(H), (I). Because we were uncertain "whether the court intended to sentence Mendivil as a category-one or category-two repetitive offender on counts five through seven, we vacate[d] those sentences and remand[ed] for resentencing." *Mendivil*, No. 2 CA-CR 2016-0273, ¶ 3. We otherwise affirmed Mendivil's convictions and terms of probation. *Id.* ¶ 4.

¶4 Before resentencing, Mendivil filed a memorandum arguing that classifying him as a repetitive offender under § 13-703 was "improper." He pointed out that any fact that exposes him to a greater penalty beyond the prescribed statutory maximum must be submitted to a jury. *See Alleyne v. United States*, 570 U.S. 99, 103 (2013); *see also Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Quoting *State v. Flores*, 236 Ariz. 33, ¶ 5 (App. 2014), Mendivil reasoned that being sentenced as a repetitive offender under § 13-703 exposed him to a higher range of sentences and, thus, "the determination whether his offenses had been committed on the same occasion . . . was required to have been submitted to the jury, inherent in the jury's verdicts, or otherwise excepted from *Alleyne* and *Apprendi*." Because none of those factors applied in his case, Mendivil maintained the court should sentence him as a first-time offender.

¶5 At resentencing, the trial court questioned the timeliness of Mendivil's argument and pointed out that it may "have made a different decision about the overall sentences on the other counts . . . had [he] brought this up at the time of the original sentencing." The state added that this court had "reviewed the entire case under *Anders*" and that Mendivil's argument was "kind of reopening the Court of Appeals case, which [was] not proper." Apparently agreeing with the state, the trial court concluded the only issue before it was whether it had intended to sentence Mendivil as a category-one or category-two repetitive offender for counts five through seven. The court then sentenced him to 2.5 years' imprisonment as a category-one repetitive offender for count five and 4.5 years' imprisonment as a category-two repetitive offender for counts six and seven, with all the sentences running concurrently. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶6 Mendivil contends the trial court erred in sentencing him as a repetitive offender under § 13-703 because the court "failed to instruct the jury to decide the state's allegation that [the] forgery offenses were not committed on the same occasion but consolidated for trial" and it was not "inherent in the jury's verdicts that [the] forgery offenses were not committed on the same occasion." The state concedes "the determination of whether the offenses were committed on the same occasion should have been submitted to the jury and was not inherent in its verdicts," but it maintains "any error was harmless because no reasonable jury would have failed to find that the crimes were not committed on the same occasion." We conclude the issue has been waived.

¶7 Generally, when a defendant fails to object to alleged trial error until appeal, the issue is forfeited for all but fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20 (2005). However, the defendant waives, without the need for fundamental-error review, any issue that he fails to raise both below and as part of the first direct appeal, assuming he could have done so. *State v. Youngblood*, 173 Ariz. 502, 504-05 (1993); *see also State v. Carver*, 160 Ariz. 167, 175 (1989) (failure to argue claim on appeal usually constitutes abandonment and waiver). Simply put, "appeals from a judgment may not be taken piecemeal." *Youngblood*, 173 Ariz. at 505 (quoting *Paramount Pictures Inc. v. Holmes*, 58 Ariz. 1, 4 (1942)). The reasoning is simple: "The '[e]fficient and orderly administration [of justice] requires some point in time at which it is too late to raise new issues on appeal." *Id.* (alterations in *Youngblood*) (quoting *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503 (1987)).

¶8 Here, the state alleged at the time of Mendivil's indictment that, pursuant to § 13-703, the forgery offenses were "not committed on the same occasion" but were "consolidated for trial." *See Henderson*, 210 Ariz. 561, ¶ 12 (describing *Apprendi* as trial error). Accordingly, Mendivil could have raised this *Apprendi* issue at trial by requesting jury instructions and special verdict forms, but he did not do so. Then, having been convicted and after receiving the presentence report showing counts five through seven as repetitive offenses, Mendivil could have raised the issue at the original sentencing. But he did not do so. Last, having been sentenced as a repetitive offender, Mendivil could have raised the issue in his first appeal. But again he did not do so. Instead, he waited until after the case had been remanded for resentencing.

¶9 By considering Mendivil's argument at this late stage, we would be allowing a piecemeal appeal, potentially requiring a third sentencing. *Cf. State v. Rhodes*, 112 Ariz. 500, 506 (1975) (defendant precluded from raising issue in second appeal after new trial when not raised in first appeal); *State v. Guthrie*, 110 Ariz. 257, 258 (1974) (excessive sentence not raised in original appeal and could not be raised after re-pronouncement of sentence); *State v. Hughes*, 8 Ariz. App. 366, 368 (1968) (appellant precluded from raising issue not presented in first appeal). This is not consistent with an "[e]fficient and orderly administration [of justice]." *Youngblood*, 173 Ariz. at 505 (alterations in *Youngblood*) (quoting *Hawkins*, 152 Ariz. at 503).

¶10 The trial court's review on remand—and our review on appeal—is limited to "the scope of the matter remanded." *State v. Hartford*, 145 Ariz. 403, 405 (App. 1985); *see Harbel Oil Co. v. Superior Court*, 86 Ariz. 303, 306 (1959). Thus, as the court pointed out below, resentencing was to occur on only three of the counts. By raising his argument so late in the case, Mendivil would have effectively limited the court's sentencing discretion, assuming his argument had been successful, because the court could not revisit the probation terms imposed for the remaining counts. *See State v. Ward*, 200 Ariz. 387, ¶ 5 (App. 2001) (trial court has broad discretion in sentencing). This further supports our conclusion that waiver is appropriate here. *See State v. Lopez*, 217 Ariz. 433, n.4 (App. 2008) (doctrine of waiver is discretionary).

Disposition

¶11 We affirm Mendivil's sentences for counts five, six, and seven.